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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CATHODE RAY TUBE (CRT) ANTITRUST
LITIGATION

This Relates to:

Order Filed 11/17/2014

MDL No 1917

Master Case No 3:07-cv-05944SC

**SPECIAL MASTER'S REPORT AND
RECOMMENDATION RE SETTLEMENT**

1 In accordance with the mandate of the *Manual for Complex Litigation 4th*, ¶10.13
2 at 12 (Federal Judicial Center 2004) “periodically [to] monitor[] the progress of the litigation”
3 and the court’s case management authority to “facilitat[e] settlement” pursuant to FRCP
4 16(a)(5), the court has directed the undersigned to report on the status of settlement efforts in
5 the above litigation and to make such recommendations that may assist the parties in reaching
6 settlements where appropriate. Order filed 11/17/14, Doc 3118. This responds to that
7 directive.

8 Presently, the court and parties face imminent dates for hearing and reaching
9 decisions on a large number of summary judgment motions accompanied by voluminous
10 submissions as well as pretrial and trial dates shortly after the first of the year. Many additional
11 pretrial motions, such as motions *in limine*, trial scheduling and bifurcation of issues and parties
12 can be expected and, if filed, will have to be argued and decided. In addition, numerous
13 discovery issues remain to be resolved and discovery continues even though the discovery cut-
14 off has passed. The task ahead for both the parties and the court is daunting. Although
15 settlements are unlikely to resolve all claims and issues in this massive litigation, settlements of
16 some claims should streamline the litigation that remains.

17 Some significant settlements have already been achieved. The direct purchaser
18 plaintiff (“DPP”) class have resolved substantially all their claims. Final approval for all but two
19 defendants and the claims process has been granted by the court. Unfortunately, some of the
20 DPP settlements have been complicated by uncertainty about membership in the class, an issue
21 now before the court and one that could lead to appellate review. Nonetheless, the DPP
22 settlements have materially reduced the scope of this litigation. For purposes of this report,
23 the significance of the DPP settlements is that despite the complex fact issues in the DPP
24 litigation and the legal uncertainties the parties in all the CRT cases face, about which more will
25 be said presently, experienced and highly competent counsel on both sides of the DPP cases
26 have been able to work through these difficult issues to a resolution.

27 In addition, some of the direct action plaintiff (“DAP”) cases have settled and
28 counsel in a number of DAP cases are fruitfully engaged in settlement discussions. Achieving
settlements of the indirect purchaser plaintiff (“IPP”) class cases has proven more difficult. Two

1 problems, in particular, have been obstacles to settlement in the IPP cases. Both issues are
2 matters that have already come to the court's attention, although perhaps in different contexts
3 and, therefore, the implications of these developments for settlement may not have been
4 apparent to the court.

5 First, as previously related directly to the court, there has been a lack of
6 "meaningful coordination" of fact and expert discovery by the IPPs' lead counsel and the
7 California Attorney General's Office ("Cal AG"). See e.g., *In re CRT Antitrust Litigation*, No 3:07-
8 cv-5944-SC, MDL No 1917, Varanini Declaration, Doc 2859 at 2-3, filed September 18, 2014 (ND
9 Cal). The Cal AG is pursuing *parens patriae* claims on behalf of California "natural persons" in
10 San Francisco superior court against essentially the same defendants as are named in this court
11 by the IPPs. See Cal Bus & Prof Code, §16760. In most instances, where there has been parallel
12 *parens patriae* litigation brought by the Cal AG and indirect purchaser class litigation, the Cal AG
13 has been able to coordinate her litigation in state court with litigation on behalf of the IPPs in
14 federal court thereby avoiding duplication of effort and unnecessary expense.¹

15 In this litigation, however, the Cal AG and IPPs' lead counsel have been unable to
16 reach an accommodation to avoid these difficulties. Hence the extent of releases afforded by
17 settlement of the Cal AG's claims is a matter in dispute. The Cal AG and IPPs' lead counsel are
18 presently litigating these issues in state court with attendant distraction of their respective
19 efforts.² These issues have already been presented to this court. But the point for purposes of
20 this report is that the inability of IPP lead counsel and counsel for the Cal AG to resolve their
21 respective responsibilities has opened up a new front of conflict that in most cases involving
22 indirect purchaser and *parens patriae* claims has been avoided.

23 Coordination of the *parens patriae* action would assist not only this court, but
24 would assist the state court, as well. See, e.g., the state court's case management order, dated

25 ¹ See e.g., *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No 3:07-md-1827SI, Indirect Purchaser Plaintiffs'
26 and Settling States' Joint Motion to Appoint Fund Administrator and Distribute Settlement Fund, Doc 9217, filed
27 9/12/14 (ND Cal 2014), Attachment A.

28 ² See e.g., *The State of California et al v Chungwha Picture Tubes Ltd*, No CGC-11-515786, Sur-Reply of
Objector Figone in Opposition to Motion for Final Approval of Philips Settlement, filed 11/27/13 (Superior Court
for the State of California), Attachment B.

1 November 12, 2014, Attachment C. Uncertainty about the relationship of the *parens patriae*
2 claims and the IPP claims has been exacerbated by the Ninth Circuit's recent decision in
3 *California v Intelligender, LLC*, __ F3d __, 2014 WL 5786718 (9 Cir 2014), thus compounding the
4 difficulties created by the lack of coordination between IPP lead counsel and the Cal AG.

5 Second, preparing for trial of the IPP claims is particularly complex, involving as it
6 does the sometimes inconsistent laws of many states and the problems of tracing alleged
7 damages through the distribution chain to the indirect purchasers. It is understandable that
8 attention of IPP lead counsel to settlement may have taken a back seat to trial preparation. By
9 the same token, fast approaching pretrial and trial dates, as those in this litigation, are usually
10 conducive to settlements or, at least, serious settlement discussions. With one notable
11 exception, however, IPP lead counsel has made little progress in the face of these looming
12 deadlines. Furthermore, the IPP settlement discussions that the undersigned has been privy to
13 do not appear to have been pursued with the degree of earnestness required to produce
14 results. This most likely is the product not of a lack of good intentions, but rather of the IPP
15 settlement team being understaffed in the face of the demands of getting ready for trial.

16 Hence, the undersigned recommends that the IPP team be augmented to
17 explore settlement and to resolve the outstanding issues with the Cal AG. Although IPP lead
18 counsel should welcome the needed assistance, he may well oppose this recommendation as it
19 would represent a dilution of his hitherto undiluted authority over the IPP cases. Should that
20 occur, the court should most certainly fully hear IPP lead counsel and consider his views
21 thoughtfully. A prior draft of this recommendation was furnished IPP lead counsel on
22 November 19, 2014. All other parties should also be invited to weigh in on this
23 recommendation.

24 Notwithstanding possible opposition by IPP lead counsel and possibly others, the
25 undersigned believes that the appointment of a committee of IPP counsel to deal with
26 settlement is warranted. Such a committee is particularly called for where, as here, "group
27 members' interests and positions are sufficiently dissimilar to justify giving them representation
28 in decision making." *Manual for Complex Litigation*, 4th, ¶10.221 at 25. Perhaps as many as
fifty counsel have brought IPP claims. Achieving consensus among that number of lawyers with

1 widely disparate client interests requires coordination beyond the time and capability of any
2 one lawyer, despite that lawyer's capability and dedication. This recommendation does not
3 entail replacing lead IPP counsel, but rather calls for augmenting the IPP team so that adequate
4 attention and effort can be devoted to settlement.

5 Accordingly, in order for the settlement process to move forward, the
6 undersigned RECOMMENDS that the court appoint additional lawyers from the ranks of those
7 who represent IPPs to assume the laboring oar in seeking to coordinate IPP claims with the
8 *parens patriae* claims of the Cal AG and in settlement negotiations. Because of the obvious
9 need to coordinate settlement efforts with trial preparation and because of the substantial
10 experience and efforts of IPP lead counsel, the undersigned RECOMMENDS that two
11 experienced and able counsel representing indirect purchaser plaintiffs be assigned to work
12 with IPP lead counsel. Two such counsel have presented themselves and expressed willingness
13 to assume these responsibilities: Francis O Scarpulla and Josef D Cooper. Both are well known
14 to the undersigned through many years of experience in the antitrust bar and have already
15 done substantial work in this litigation. Messrs Scarpulla and Cooper participated
16 constructively and effectively in negotiating settlements on behalf of indirect purchasers in the
17 TFT-LCD litigation before Judge Illston, which the undersigned mediated and in the DRAM
18 Litigation before Judge Hamilton. It is recommended that Messrs Scarpulla and Cooper work
19 with IPP lead counsel as a three-person committee to deal with settlement and coordination
20 with the Cal AG.

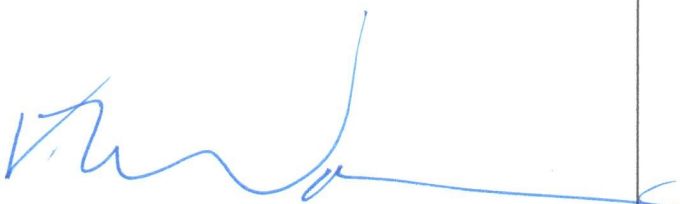
21 The undersigned has considered alternatives to this recommendation. One such
22 alternative would be for the court to order the parties to mediation. While that sometimes
23 proves effective in other cases, its effectiveness in this litigation is questionable. The number of
24 lawyers who play important roles and their various client interests would make omnibus
25 mandated mediation sessions unwieldy and not likely to prove fruitful. Furthermore, of course,
26 a mandated mediation will not likely resolve the lack of coordination between IPP lead counsel
27 and the Cal AG. Another alternative would be for the court simply to push ahead with trial
28 preparation and let settlements take their own course. In addition to complicating the court's
case management tasks, such an approach would disserve the parties. The claims at bar are

1 substantial, the facts out of which they arose are complex and the applicable laws are manifold
2 and, in some significant respects, unsettled. Compare, *Motorola Mobility LLC v AU Optronics*
3 *Corp*, ___ F3d ___ 2014 WL 6678622 (7 Cir 2014) with *In re TFT-LCD (Flat Panel) Antitrust*
4 *Litigation*, 2012-2 Trade Cases ¶178,031, 2012 WL 3276932 (N D Cal 2012). These are
5 circumstances that often make settlement sensible for parties on both sides of a case. Hence, I
6 believe there are realistic prospects for significant settlements in this litigation. It would be
7 unfortunate for those prospects not to be energetically pursued by lawyers who have
8 demonstrated the capability to achieve significant settlements in similar litigation and to work
cooperatively with the Cal AG.

9 IT IS THEREFORE RECOMMENDED that Francis O Scarpulla and Josef D Cooper be
10 designated as co-lead counsel for the IPPs to work with IPPs' lead counsel as a committee for
11 the purpose of assisting in the coordination of this litigation with related state court litigation
12 and in negotiation of settlement of such actions as appropriate and to assist IPPs' lead counsel
13 in his trial preparation efforts. The court should invite IPP lead counsel and any party that
14 wishes to do so to comment on or oppose this recommendation within a time period
15 convenient to the court's schedule and, of course, to consider any such views that are
16 presented.

17 IT IS SO RECOMMENDED.

18
19 DATED: December 12, 2014

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21 
22 Vaughn R Walker
Special Master, United States District Judge (Ret)